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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-11

NORTHERN CALIFORNIA POWER AGENCY,
Petitioner,

v.

FEDERAL POWER COMMISSION AND PACIFIC GAS AND ELECTRIC COMPANY,
Respondents.

Brief of Respondent Pacific Gas and Electric Company in Opposition to Petition for a Writ of Certiorari

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TABLE OF CONTENTS

	Page
I. Questions Presented	1
II. Statement of the Case	2
A. The Interested Parties	2
B. The Contracts Approved Below and Their Background	3
C. The Proceedings Below	5
III. Argument	7
A. The Decision of the D.C. Circuit Court of Appeals Is in No Way in Conflict with Applicable Decisions of This Court	7
1. The Court of Appeals and the FPC Recognized the Responsibility of the FPC to Consider the Anticompetitive Consequences of Matters Properly Before It	8
2. The Court of Appeals Properly Interpreted *Gulf States* as Preserving the FPC's Discretion to Dispose of Allegations of Anticompetitive Effects Without a Hearing in Appropriate Circumstances	9
3. The FPC Has Adequately Explained the Reasons for Summary Action in This Case	9
B. The Opinion of the D.C. Circuit Court of Appeals Does Not Decide an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court	10

Page

The Decision of the FPC Below to Dismiss NCPA's Complaint Without a Hearing Turned on the Facts of the Particular Case and Thus Presents No Important Question of Federal Law 10

C. The Decision Below Was Correct; Affirmance Would be Superfluous 12

1. The Court of Appeals and the FPC Correctly Interpreted the Jurisdictional Limitations on the Commission 13

2. The Court of Appeals Properly Approved the FPC's Discretionary Decision to Dispose of NCPA's Charges Without a Hearing 14

IV. Conclusion 16

TABLE OF AUTHORITIES CITED

CASES Pages

Arkansas Power & Light Co., 50 F.P.C. 1289 (1973) *rev'd sub nom.* Conway Corp. v. FPC, 510 F.2d 1264 (D.C. Cir. 1975) 11, 12

Central West Utilities Co. v. FPC 297 F.2d 306 (3d Cir. 1957) 14

Chemehuevi Tribe of Indians v. FPC, ... U.S. ....., 43 L.Ed.2d 279 (1975) 14

City of Lafayette v. SEC, 454 F.2d 941 (D.C. Cir. 1971), *aff'd sub nom.* Gulf States Utilities v. FPC 411 U.S. 747 (1973) 12, 15

City of Paris v. Kentucky Utilities Co., 41 F.P.C. 44 (1969) 12

Conway Corp. v. FPC 510 F.2d 1264 (D.C. Cir. 1975) 12

Gainesville Utilities Dept. v. Florida Power Corp., 40 F.P.C. 1227 (1968), 41 F.P.C. 4 (1969), *rev'd,* Florida Power Corp. v. FPC, 425 F.2d 1196 (5th Cir. 1970), *rev'd,* Gainesville Utilities Dept. v. Florida Power Corp., 402 U.S. 515 (1971) 12

Georgia Power Co. v. FPC, 373 F.2d 485 (5th Cir. 1967) 13

Gulf States Utilities, 44 F.P.C. 1524 (1970), *rev'd sub nom.* City of Lafayette v. SEC 454 F.2d 941 (D.C. Cir. 1971), *aff'd sub nom.* Gulf States Utilities v. FPC, 411 U.S. 747 (1973) 11

Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973) 7, 8, 9, 10, 11, 12, 15

Northern California Power Agency v. FPC, 514 F. 2d 184 (D.C. Cir. 1975) 7, 8, 10, 13

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 12

STATUTES	Pages
Atomic Energy Act § 105, 42 U.S.C. § 2135	5
Federal Power Act, Part I, 16 U.S.C. §§ 792-823	14
Federal Power Act § 204, 16 U.S.C. § 824c	9
Federal Power Act § 205, 16 U.S.C. § 824d	1, 3
Federal Power Act § 206, 16 U.S.C. § 824e	5, 11
Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b)	5, 7, 13

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Brief of Respondent Pacific Gas and Electric Company in Opposition to Petition for a Writ of Certiorari

Respondent Pacific Gas and Electric Company hereby opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

1. QUESTION PRESENTED

If the Court were to grant certiorari, the question presented would be:

Did the Federal Power Commission abuse its discretion by accepting a contract for filing under Section 205 of the Federal Power Act, 16 U.S.C. § 824d, without holding a hearing on an intervenor's antitrust charges where the FPC, as explained in its decision, had no jurisdiction to

grant the relief requested by the intervenor, and where there was no reasonable connection between the intervenor's antitrust charges and the contract rates over which the FPC did have jurisdiction?

II. STATEMENT OF THE CASE

A. The Interested Parties.

The respondent Pacific Gas and Electric Company ("PGandE") is a public utility whose sales for resale of electric power are subject to regulation by the respondent Federal Power Commission ("FPC"). PGandE is engaged, *inter alia*, in the generation, transmission, distribution and sale of electric power at wholesale and retail in northern and central California.

The petitioner Northern California Power Agency ("NCPA") is a public agency, created by an agreement among a widely scattered group of California cities, namely Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah. (R. 134-35, 143-55)[1] Each of the member cities is engaged in the distribution and retail sale of electric power to consumers within its boundaries. Neither NCPA nor any of its members owns electric generation or high voltage transmission facilities. All power sold by NCPA members is purchased from the Bureau of Reclamation of the United States Department of the Interior or from PGandE. (R. 134-35)

Sacramento Municipal Utility District ("SMUD") is not a party to this case but is a party to the contracts with PGandE which were accepted for filing by the FPC. SMUD is a public agency of the State of California engaged in the business of supplying electric power in the City of Sacramento and surrounding areas. SMUD is not a member of NCPA, but like NCPA is a public agency exempt from the regulatory supervision of the FPC. Federal Power Act § 201(f), 16 U.S.C. § 824(f). Unlike NCPA or its member cities, SMUD possesses a fully integrated and operational generation, transmission and distribution system. (R. 136-37) SMUD has just completed construction of a large nuclear generating unit, known as Rancho Seco No. 1.

1. References to the record in the court below will be indicated throughout this brief by use of the letter "R" followed by a page reference.

B. The Contracts Approved Below and Their Background.

In order to meet the growing electric power needs of its customers, SMUD decided to construct a large nuclear generating plant. (R. 206) While such a plant would achieve significant economies of scale, SMUD, as a relatively small system, was faced with the related problems of securing financing for its plant, finding a dependable market for the substantial portion of the plant's output that would initially be surplus to SMUD's own needs, and acquiring reserve support when the plant was shut down for any reason. Seeking a solution to these and other problems, SMUD opened negotiations with PGandE in 1966 and agreements were concluded in mid-1970 after approximately five years of arm's-length negotiations between PGandE and SMUD (R. 206-08) A new "Power Sale, Exchange and Integration Contract" and an amendment to the existing contract to provide transition between the old and new arrangements were agreed to. PGandE filed both contracts as rate schedules pursuant to Section 205 of the Federal Power Act, 16 U.S.C. § 824(d), since its sales to SMUD are subject to FPC regulatory jurisdiction. These contracts, filed with the FPC on December 21, 1970, and denominated respectively "FPC Electric Rate Schedule No. 45" and "Supplement No. 1 to FPC Electric Rate Schedule No. 34" were

the contracts accepted for filing as rate schedules by the FPC below.

The principal agreement, and the only one challenged below, is the Power Sale, Exchange, and Integration Contract, FPC Electric Rate Schedule No. 45. (R. 56-133) Under this contract, PGandE obligated itself to purchase any of the capacity and energy from Rancho Seco Unit No. 1 which is temporarily surplus to SMUD's needs (R. 81-84), thus assuring a market for the plant at full capacity. This guaranteed source of revenue to SMUD from a utility of proven financial reliability (PGandE) had the added advantage to SMUD of increasing the marketability of debt securities issued to finance the plant. (R. 208) Under the contract, PGandE also agreed to provide reserve capacity when the plant is shut down. (R. 75-76) FPC Rate Schedule No. 45 also established capacity and energy "bank accounts." Under this portion of the agreement, PGandE agreed to sell power to SMUD when it is needed in the future in an amount equal to the surplus power purchased from SMUD. This enabled SMUD to defer the construction of a second large thermal plant, to draw on its capacity and energy accounts (i.e., obtain power from PGandE) to meet its power needs prior to the construction of the second unit, and then to replenish its accounts later by delivering capacity and energy back to PGandE when the second unit is built. (R. 79-80)

FPC Electric Rate Schedule No. 45 stated the understanding of the parties that the second unit contemplated by SMUD would have an expected capacity of approximately 830 megawatts (R. 60), but the contract did not limit

the second plant to that size. (R. 173)[2] This contract runs until January 1, 1993, but may be terminated by either party upon 6 years' notice. (R. 113)

C. The Proceedings Below.

After the contracts were filed with the FPC, NCPA filed a complaint with the Commission primarily alleging that PGandE was engaged in a scheme to monopolize the generation of electric power in northern and central California and that the filed contracts were a part of this scheme. (R. 127-39) NCPA sought a hearing, citing Federal Power Act Section 205(e), 16 U.S.C. § 824(e). (See R. 231)[3] By way of relief, NCPA requested the FPC to find:

> "(a) that the June 4, 1970, contracts are unjust and unreasonable, and therefore unlawful, against the public interest, and in violation of the antitrust laws, and void, insofar as they purport to empower PGandE to exclude NCPA from any participation in SMUD's electric power operation;
>
> (b) that such contracts may be approved if they are amended to provide (i) for the increase in capacity of Thermal Unit No. 2 to approximately 1,150,000

2. SMUD has determined since the FPC's decision below that SMUD's second thermal unit will be nuclear, that it will have a capacity of approximately 1100 megawatts, and that it will be constructed as a joint venture rather than by SMUD alone. NCPA has been invited to participate in the project. The Nuclear Regulatory Commission will conduct a prelicensing antitrust review of the project pursuant to Section 105 of the Atomic Energy Act, 42 U.S.C. § 2135(c) before issuing a construction permit.

3. In spite of the frequent reference to Section 206 of the Federal Power Act, 16 U.S.C. § 824(e), in the certiorari petition, no reference to that section of the Act was made by NCPA in any paper filed with the FPC below. Although in this case the same result should obtain under either section, a purported failure of the FPC to comply with the provisions of Section 206 cannot be an issue on appeal since no such objection to the order below was made in NCPA's petition for rehearing in the Commission. (R. 230-238) See Federal Power Act § 313(b), 16 U.S.C. 825*l*(b).

kilowatts, or such larger size as the parties may agree to, with that portion of the capacity in excess of 830,000 kilowatts made available to NCPA through NCPA financing or contractual commitment for the life of the unit; (ii) for an agreement between NCPA and PG & E for the use of such increased capacity for reserves, maintenance and overhaul, delivery to NCPA members, and dispositions of surplus; and (iii) for consideration of the possibility of NCPA utilizing a part of SMUD's surpluses between the time Rancho Seco No. 1 goes into commercial operation and prior to commercial operation of Thermal Unit No. 2;

and to grant such other and further relief as may appear appropriate." (R. 139-41.)

In short, NCPA wanted SMUD to make available to it a share in Rancho Seco No. 2, when built, and an opportunity to purchase surplus power from Rancho Seco No. 1.

The FPC considered NCPA's complaint and issued an order on June 8, 1971, accepting the contracts as rate schedules. The Commission dismissed NCPA's complaint on the basis of the papers filed, explaining that it had no jurisdiction to order the expansion of generating facilities, had no jurisdiction over SMUD (a public agency) and thus could not grant NCPA relief. Appendix B to the Petition at 9-11. The FPC noted that the Atomic Energy Commission appeared to have jurisdiction over the matter. Appendix B to the Petition at 9-10.

On August 3, 1971, the FPC granted NCPA's request for rehearing, Appendix C to the Petition, and on May 5, 1973, issued another order stating that it had considered NCPA's complaint, but that "legal jurisdictional reasons preclude the Commission from granting the substantive relief which NCPA seeks." Appendix D to the Petition at 19. Accordingly, a hearing on NCPA's complaint would

have been futile and the FPC affirmed its earlier order. The FPC's reasoning was explained in some detail. See Appendix D to the Petition.

The decision of the FPC was appealed to the D. C. Circuit Court of Appeals pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). The matter was placed on the summary calendar for argument before the Court of Appeals and the decision of the FPC was affirmed in a unanimous opinion, *Northern California Power Agency v. FPC*, 514 F.2d 184 (D.C. Cir. 1975), Appendix F to Petition. The Court of Appeals identified the "crucial issue" before it as whether the denial of hearing on NCPA's allegations was an abuse of discretion by the FPC. 514 F.2d at 187, Appendix F to the Petition at 31-32. The Court of Appeals concluded that a hearing was not mandatory, that the FPC had adequately explained its disposition of the matter, and had not abused its discretion under the circumstances. 514 F.2d at 188-89, Appendix F to the Petition at 32-35.

III. ARGUMENT

A. The Decision of the D.C. Circuit Court of Appeals Is in No Way in Conflict with Applicable Decisions of This Court.

The principal argument advanced by NCPA in support of its petition for certiorari is that the decision of the Court of Appeals is inconsistent with the principles enunciated by this Court in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973). Nothing could be further from the fact. The court below cited and carefully followed the decision in *Gulf States*.

1. THE COURT OF APPEALS AND THE FPC RECOGNIZED THE RESPONSIBILITY OF THE FPC TO CONSIDER THE ANTICOMPETITIVE CONSEQUENCES OF MATTERS PROPERLY BEFORE IT.

The Court of Appeals followed *Gulf States* and applied the general rule that in making determinations under broad statutory standards, such as "the public interest" or "just and reasonable", regulatory agencies should consider anticompetitive effects as well as other factors that may be relevant to such a determination. As stated by the court below:

> "The Supreme Court and this court have held, time and again, that the Federal Power Commission, as other regulatory agencies, must consider the anticompetitive consequences of matters properly before it. *See, e.g., Gulf States Utilities Co. v. FPC,* 411 U.S. 747 . . . . That the doctrine is by now fully engrained in our jurisprudence is beyond question." 514 F. 2d at 187, Appendix F to the Petition at 31.

The court below also noted that the FPC had recognized its responsibility to consider the competitive consequences of matters before it for approval. 514 F.2d at 187, Appendix F to the Petition at 31. In the words of the Commission in its order on rehearing:

> "The Commission has regulatory jurisdiction over PG&E. . . . In the exercise of that regulatory jurisdiction the Commission necessarily considers anti-competitive factors which fall therein. . . .
>
> "The Commission's order of June 8, 1971 [dismissing the complaint] does not fail to consider NCPA's complaint. It does so expressly. . . ." Appendix D to the Petition at 18-19.

The record is clear that both the Court of Appeals and the FPC properly recognized the Commission's responsibility to consider the anticompetitive consequences of matters before it as required by *Gulf States.*

2. THE COURT OF APPEALS PROPERLY INTERPRETED GULF STATES AS PRESERVING THE FPC'S DISCRETION TO DISPOSE OF ALLEGATIONS OF ANTICOMPETITIVE EFFECTS WITHOUT A HEARING IN APPROPRIATE CIRCUMSTANCES.

Both the Court of Appeals and the FPC concluded that a hearing on NCPA's antitrust charges was unnecessary under the circumstances of this case. Such a decision is in no way inconsistent with the decision in *Gulf States.* Indeed, in its *Gulf States* opinion, this Court went to some lengths to make clear that the FPC retained discretion to dispose of antitrust allegations without a hearing. In the words of the Court:

> "Our conclusion that, as a general rule, the Commission must consider anticompetitive consequences of a security issue under § 204 *does not mean that the Commission must hold a hearing on objections in every case.* Neither does it mean that every allegation must be fully investigated regardless of its facial merit, or that consideration of the allegations may not, in appropriate circumstances be deferred. . . . So strict a rule would unduly limit the discretion the Commission must have in order to mold its procedures to the exigencies of the particular case. . . ." 411 U.S. at 762 (emphasis supplied).

On this point, too, the decision below is consistent with *Gulf States.*

3. THE FPC HAS ADEQUATELY EXPLAINED THE REASONS FOR SUMMARY ACTION IN THIS CASE.

Although this Court was careful in its *Gulf States* opinion to preserve the authority of the FPC to rule on antitrust charges without a hearing, it did indicate that it would be necessary for the Commission to explain any summary disposition of such objections. See 411 U.S. at 763-64. In the instant case, the FPC granted a rehearing of its initial dis-

missal order and, after due consideration, issued a second order explaining its reasoning in detail and affirming its earlier dismissal of NCPA's charges. See Appendix D, particularly at 18-22. *Gulf States* requires no more.

Thus, the decisions below demonstrate adherence to the principles enunciated by this Court in *Gulf States*.

B. The Opinion of the D.C. Circuit Court of Appeals Does Not Decide an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The question which PGandE believes would be presented if this Court were to grant certiorari is stated at the beginning of this brief. That issue presents no broadly applicable principle of federal law, but rather turns on the peculiar facts of this particular case. Accordingly, no adequate reason appears for granting certiorari.

THE DECISION OF THE FPC BELOW TO DISMISS NCPA'S COMPLAINT WITHOUT A HEARING TURNED ON THE FACTS OF THE PARTICULAR CASE AND THUS PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973), discussed in detail above, is a recent, carefully articulated statement by this Court of the only important legal principles of general interest pertinent to this case. *Gulf States* settled the question of the FPC's responsibility to consider pertinent competitive factors in its administration of the Federal Power Act. *Gulf States* settled the question of whether the FPC retained discretion to rule on objections alleging anticompetitive effects without a hearing. And *Gulf States* settled the question of the FPC's duty to explain any summary action it might take. This case now presents the question of whether the discretion, which according to *Gulf States* the FPC has, to act without a hearing was properly exercised under the facts of this case. That was the "crucial issue" identified by the court below. 514 F.2d at 187. PGandE submits that decisions on such questions, which

turn on the facts of each particular case presented to the regulatory agency, are of such limited precedential value that this Court ought not trouble with them in the normal course. The application on a day-to-day basis of the principles enunciated in *Gulf States* is best left to the regulatory agencies, supervised by the Courts of Appeals.

NCPA seeks to elevate the importance of the decision below by arguing that it is "part of a line of cases by which the Federal Power Commission has sought to disable itself from administering the Act in a manner consistent with the antitrust laws." Petition at 10. The Court of Appeals discerned no such line, nor do we. While there have been cases (Petitioner mentions four, in addition to the present case, covering a span of seven years) in which the FPC has dismissed allegations of anticompetitive conduct for one reason or another, there have been other cases in which it has ordered an investigation of and hearing on such charges. E.g., *Pacific Gas and Electric Co.*, FPC Docket No. E-7777;[4] *Pacific Power & Light Co.*, FPC Docket No. E-7796. Moreover, even if there were a pattern of questionable decisions in the FPC, it would be a matter of immediate concern to this Court only if the pattern were duplicated in the Courts of Appeals. Of the cases mentioned by the petitioner, two, *Gulf States Utilities*, 44 F.P.C. 1524 (1970), and *Arkansas Power*

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4. Indeed, on March 14, 1974 in *Pacific Gas and Electric Company*, Docket No. E-7777 in the Federal Power Commission, the FPC, in light of the antitrust charges made by NCPA and certain of its member cities in that proceeding, ordered the institution of an investigation and a hearing under Section 206 of the Federal Power Act, 16 U.S.C. § 824e, into the justness and reasonableness of four contracts to which PGandE is a party. Included among the four contracts to be reviewed by the FPC in that proceeding is the Power Sale, Exchange and Integration Contract, FPC Rate Schedule No. 45, the very contract challenged by NCPA below. It therefore appears that NCPA will get the hearing it wishes and, if it proves its case, will secure whatever relief the FPC has authority to give.

& Light Co., 50 F.P.C. 1289 (1973), were reversed by the Court of Appeals *sub nom.*, respectively, *City of Lafayette v. SEC*, 454 F.2d 941 (D.C. Cir. 1971) and *Conway Corp. v. FPC*, 510 F.2d 1264 (D.C. Cir. 1975). On the other hand the instant case was, of course, affirmed. Another decision identified by NCPA as a part of this questionable "pattern," *Gainesville Utilities Dept. v. Florida Power Corp.*, 40 F.P.C. 1227 (1968), 41 F.P.C. 4 (1969) was reviewed and affirmed by this Court. *Gainesville Utilities Dept. v. Florida Power Corp.*, 402 U.S. 515 (1971), *reversing Florida Power Corp. v. F.P.C.*, 425 F.2d 1196 (5th Cir. 1970). Finally, the FPC's decision in *City of Paris v. Kentucky Utilities Co.*, 41 F.P.C. 44 (1969), was effectively approved by this Court in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 375-76 (1973). Even without discussing the propriety of each decision, it is apparent that no pattern exists that should give rise to concern on the part of this Court. Accordingly, NCPA's line of cases argument does not support its petition for certiorari.

C. The Decision Below Was Correct; Affirmance Would Be Superfluous.

Not only is the decision below consistent with this Court's opinion in the *Gulf States Utilities* case, not only does it decide no important question of federal law not yet decided by this Court, but in addition the decision is clearly correct. Accordingly, there is no injustice which should be redressed by this Court through a writ of certiorari.

1. THE COURT OF APPEALS AND THE FPC CORRECTLY INTERPRETED THE JURISDICTIONAL LIMITATIONS ON THE COMMISSION.

The limits on the jurisdiction of the FPC were largely conceded. As stated by the Court of Appeals:

> "All parties agree that the Commission is precluded from asserting jurisdiction over SMUD. *See* 16 U.S.C. §§ 824(b), (f)." 514 F.2d at 185, Appendix F at 27.

As the court below noted, the only matters subject to FPC jurisdiction were those provisions of the contract by which PGandE sold power to SMUD and *those* provisions were not charged to be unjust or unreasonable.[5] 514 F.2d at 187-88, Appendix F to the Petition at 34, 35. NCPA *did* claim that in other provisions in the contract by which SMUD sold power to PGandE, SMUD discriminated in favor of PGandE. However, SMUD sales to PGandE are not subject to FPC jurisdiction. *See* Federal Power Act § 201(b, f) 16 U.S.C. § 824(b, f).

Georgia Power Co. v. FPC, 373 F.2d 485 (5th Cir. 1967), the only case on the jurisdictional issue cited by NCPA in its Petition, was a decision approving changes ordered by the FPC in the provisions of a wholesale sale contract under which a utility subject to FPC jurisdiction sold power to a municipality. The case only considered FPC authority over sales subject to FPC jurisdiction and did not consider the FPC's authority over power sales by an entity not subject to FPC jurisdiction. It therefore provides no authority contrary to the decision in this case.

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5. In its petition for certiorari, NCPA hints for the first time that PGandE's rates were set unreasonably low in exchange for the right to purchase all of SMUD's excess power. Petition at 10. However, since that unfounded assertion was never made below, it cannot now be raised on appeal. See Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b).

It also appears to be conceded that the FPC has no authority to order the expansion of any thermal power generating facility, let alone that of an agency not subject to FPC jurisdiction. The FPC's licensing jurisdiction is confined to hydroelectric facilities under Part I of the Federal Power Act, 16 U.S.C. §§ 792-823. This Court specifically ruled in March of this year that the FPC had no authority to license and regulate thermal electric plants. *Chemehuevi Tribe of Indians v. FPC*, ... U.S. ...., 43 L.Ed.2d 279 (1975). Whatever doubt may have existed about the FPC's authority in this regard has now been settled. There is no need for this Court to consider the matter again.

NCPA persists in the suggestion that the FPC could do indirectly that which it has no authority to do directly—withhold its approval of PGandE's just and reasonable rates in order to force SMUD to give NCPA the concessions it sought. Both common sense and precedent suggest that such action by the FPC would be unlawful. The court below agreed, citing *Central West Utilities Co. v. FPC*, 297 F.2d 306 (3d Cir. 1957). 514 F.2d at 189, Appendix F to the Petition at 35. By manipulating wholesale sales by large power companies, the FPC could influence or control many aspects of utility operations and many entities which Congress has explicitly withheld from its jurisdiction. Due regard for the Congressional regulatory scheme could not permit such an expansion of FPC authority.

2. THE COURT OF APPEALS PROPERLY APPROVED THE FPC'S DISCRETIONARY DECISION TO DISPOSE OF NCPA'S CHARGES WITHOUT A HEARING.

In view of the FPC's clear inability to grant NCPA the relief it sought, holding a hearing on NCPA's monopoly charge would have been a waste of time. Once the implications of the FPC's limited jurisdiction are understood, the

Commission's decision not to hold a hearing appears unexceptionable.

In affirming the FPC's decision, the Court of Appeals properly considered the lack of a "reasonable nexus" between the contract provisions subject to FPC jurisdiction and the anticompetitive scheme alleged. The lower court's attention to this point exemplifies its meticulous adherence to this Court's decision in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973).

The requirement that there be a reasonable nexus or connection between activities sought to be challenged in an administrative proceeding and the particular matter to be passed on by the agency in that proceeding was first announced in *City of Lafayette v. SEC*, 454 F.2d 941, 953 (D.C. Cir. 1971). *Gulf States*, of course, affirmed the D.C. Circuit's decision in that case, thereby indicating this Court's approval of the requirement. In *Gulf States* this Court ruled that the FPC must consider the anticompetitive consequences, if any, of the *matter before it for review*, not the legality under the antitrust laws of unrelated conduct of the applicant before the agency. This limitation in the Court's ruling appears both in its statement of the question before it, 411 U.S. at 749, its conclusion on the question, 411 U.S. at 758-59, and its description of that conclusion, 411 U.S. at 762, as well as from the analysis throughout the opinion. Thus, the Court of Appeals in this case was applying a well established concept when it considered NCPA's failure to show a reasonable nexus between PGandE's allegedly anticompetitive scheme and the matter before the Commission and approved the FPC's dismissal of NCPA's complaint.

IV. CONCLUSION

The decision of the United States Court of Appeals is consistent with the decisions of this Court, decides no important federal question which should be addressed by this Court, and is clearly correct. For these reasons the petition for a writ of certiorari should be denied.

August 22, 1975

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